IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10573 of 1994

For Approval and Signature:

HON'BLE MISS JUSTICE R.M.DOSHIT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

S F KADRI

Versus

CHIEF JUDGE,SMALL CAUSE COURT

Appearance:

1. Special Civil Application No. 10573 of 1994

MR AS SUPEHIA for IS SUPEHIA for the Petitioner

MR JB PARDIWALA for Respondent No. 1

LAW OFFICER BRANCH for Respondent No. 1

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 13/11/2003

ORAL JUDGEMENT

Heard the learned advocates.

The petitioner, a retired Superintendent of Small Causes Court, Ahmedabad, challenges the order dated 8th June, 1994 made by the learned Chief Judge, Small Causes Court, Ahmedabad with respect to the pay fixation of the petitioner with effect from 1st June, 1973.

The facts undisputed are that the petitioner entered the service on 15th January, 1952 as a Junior Clerk. After passing the lower standard departmental examination he was confirmed in service on 1st March, 1955. He was promoted to the post of Shirestedar on 2nd November, 1966. Under the Government Notification dated 21st October, 1975 the pay-scales of the Government servants were revised with effect from 1st January, 1973. While giving effect to the said revised pay-scales and fixing the pay of the petitioner the then learned Chief Judge of the Small Causes Court, Ahmedabad stepped up the date of increment of the petitioner to that of 1st January, 1973 which hitherto was first of November. Such stepping up was made with a view to bringing the petitioner's pay at par with one Shri D.M.Parmar, a Superintendent in the Court of Small Causes promoted as such on 2nd January, 1967 i.e. junior to the petitioner. The said pay fixation was not approved by the Accountant General. In view of the objection raised by the Accountant General, after some correspondence and some representations made by the petitioner, by orders dated 6th June, 1988 and 21st November, 1989 made by the learned Chief Judge, the petitioner was directed to deposit a sum of Rs.8,862=55 being the amount of excess payment of pay and allowances made to the petitioner for the period from 1st January, 1977 to 31st October, 1989. Feeling aggrieved, the petitioner preferred Special Civil Application No.394/1993 before this Court. The said petition came to be allowed on 10th November, 1993 (Coram: K.G.Shah, J.). The Hon'ble Judge set aside the above referred orders on the ground the same were made without affording the petitioner an opportunity of being heard. The respondent was further directed "to decide the matter afresh after affording reasonable opportunity to the petitioner of being heard in the matter". Pursuant to the said direction, on 8th June, 1994, after affording the petitioner an opportunity of hearing, the earlier order of refixation of pay of the petitioner has been maintained. Feeling aggrieved, the petitioner has preferred the present petition.

The learned advocate Mr.Supehia appearing for the petitioner has submitted that indisputably the petitioner was senior to one Shri D.M.Parmar. The said Shri

D.M.Parmar, though had joined the service earlier had passed the lower standard departmental examination later than the petitioner and he was confirmed in service later than the petitioner. In view of the provisions of the Civil Manual the petitioner was assigned seniority over the said Shri D.M.Parmar. In the cadre of Shirestedar also the petitioner was promoted in the year 1966. Whereas, the said Shri D.M.Parmar was promoted in the year 1967. The petitioner's confirmation in the cadre of Shirestedar was also earlier than the said Shri D.M.Parmar. Thus, for all purposes the petitioner was senior to the said Shri D.M.Parmar. Nevertheless, on promotion to the post of Shirestedar the said Shri D.M.Parmar received higher pay than what was received by the petitioner. This anomaly in the pay of the petitioner and his junior Shri D.M.Parmar was required to be removed by giving the petitioner the benefit of stepping up i.e. precisely what was done by the then learned Chief Judge, Small Causes Court, Ahmedabad while fixing the pay of the petitioner on revision of pay with effect from 1st January, 1973. Mr.Supehia has relied upon Rules 523 and 524 of the Civil Manual and has submitted that the petitioner was given seniority over the said Shri D.M.Parmar in accordance with the said Rules. He has also relied upon Rule 41A of the Bombay Civil Services Rules (hereinafter referred to as 'the BCSR') and has submitted that all the conditions mentioned in the instructions thereunder were satisfied and, therefore, the petitioner's pay was required to be brought at par with the pay of the said Shri D.M.Parmar. This having been done in consonance with the said Rules the said pay fixation made with effect from 1st January, 1973 ought not to have been interfered with by the later orders. Mr.Supehia has also submitted that in any view of the matter if at all there was any mistake in fixing the pay of the petitioner, the petitioner was not responsible for the same. Such pay fixation was not made on account of misrepresentation made by the petitioner or any fraud perpetrated by the petitioner. If the pay fixation were made by misconstruing the relevant rules and the petitioner has been given some benefit under such pay fixation the benefit already received by such petitioner should not be recovered. In support of this contention Mr.Supehia has relied upon the judgment of the Hon'ble Supreme Court in the matters of Sahib Ram v/s. State of Haryana and others [1995 Supp (1) S.C.C. 18]; of Shyam Babu Verma and others v/s. Union of India and others [(1994)2 S.C.C. 521] and of E.S.P.Rajaram and others v/s. Union of India and others [AIR 2001 S.C. 581]. Mr.Supehia has also relied upon the judgment dated 4th April, 2001 of the Division Bench of this Court

comprising Hon'ble Chief Justice Mr.D.M.Dharmadhikari (as he then was) and Mr.Justice P.B.Majmudar rendered in Letters Patent Appeal No.578/2000 in Special Civil Application No.2196/1993.

The learned advocate Mr.Pardiwala has appeared for the respondent and has contested the petition. He has submitted that the benefit of stepping up claimed by the petitioner is contrary to the provisions contained in Rule 41A of the BCSR and has rightly been rejected. He has also submitted that the reliance placed on the Civil Manual is uncalled for. The Civil Manual deals with the seniority of the Clerks inter se but it does not provide for fixation of pay. The fixation of pay has to be made in accordance with the provisions contained in the BCSR. He has submitted that the conditions mentioned in the instructions below Rule 41A of the BCSR were not existent in the present case. The claim for stepping up is, therefore, not justiciable. He has also submitted that admittedly the said Shri D.M.Parmar had entered the service earlier than the petitioner. The higher pay received by him on promotion as Shirestedar was on account of the longer service rendered by him in the cadre of Junior Clerk and the earlier date of increment. He has also submitted that not in all cases where the junior is receiving higher pay the benefit of stepping up can be granted. He has relied upon the judgments of the Hon'ble Supreme Court in the matters of Union of India and another v/s. R.Swaminathan [AIR 1997 S.C. 3554]; of Union of India and others v/s. M.Suryanarayana Rao [AIR 1998 S.C. 2992]; and of Union of India and others v/s. Sushil Kumar Paul and others [1998 (5) S.C.C. 268].

Mr.Pardiwala has also submitted that pursuant to the orders made in the years 1988 and 1989 referred to hereinabove the recovery had already been effected as directed therein. The pension and other retiral benefits have also accordingly been determined. In the event the petitioner loses in this petition the question of recovery of any amount from the petitioner shall not arise.

Rule 523 of the Civil Manual relied upon by the petitioner contains direction regarding maintenance of list of persons belonging to Class-III of the subordinate judicial service in order of seniority. Rule 524 of the Civil Manual contains instructions as to promotion and confirmation. Indisputably, the petitioner had been confirmed in service and had been given promotion in accordance with the relevant rules and the said instructions. However, neither of the said Rules

provides for pay fixation nor do they provide that the pay of the senior employee shall not be lesser than his junior's pay or, in other words, the pay of the senior if lesser shall be brought at par with the pay of his junior. The reference to the said Rules is, therefore, irrelevant.

The pay fixation on appointment/promotion of a person is necessarily done under the provisions contained in the BCSR. Rule 41 of the BCSR provides for such pay fixation. Rule 41A of the BCSR provides, inter alia, for fixation of pay where a Government servant is promoted or appointed to another post involving assumption of duties or responsibilities of greater importance. The instructions thereunder provide for increase of the pay of a senior Government servant to the level of the pay admissible to a junior Government servant in the same line subject to fulfillment of the conditions mentioned therein. One of the said conditions is to the effect that had the senior Government servant been not promoted earlier than his junior he would have been eligible to draw the pay of the lower post at a stage not lower than that admissible to the junior Government servant immediately prior to the appointment of the junior Government servant to the higher post. In other words, in case the senior Government servant had not been promoted on the date of the promotion of the junior Government servant the senior Government servant would have drawn pay at a stage not lower than that was drawn by the junior Government servant. The other condition is that the difference in the pay of the senior and the junior Government servants should have arisen on account of the application of the said Rule. In the present case, evidently neither of the aforesaid two conditions has been fulfilled i.e. as pointed out in the counter affidavit the difference in pay of the petitioner and the said Shri D.M.Parmar had arisen on account of the earlier appointment of the said Shri D.M.Parmar in the cadre of Junior Clerk and on account of his earlier date of increment. Hence, the petitioner's claim for stepping up of pay is not in accordance with the provisions contained in Rule 41A of the BCSR.

In the matter of Union of India and another (supra), similar was the issue before the Hon'ble Supreme Court arising from implementation of Fundamental Rule 22(I). The learned Judges have observed that, "...The difference in the pay of a junior and a senior in the cases before us is not a result of the application of Fundamental Rule 22(I)(a)(1). The higher pay received by a junior is on account of his earlier officiation in the

higher post because of local officiating promotions which he got in the past. Because of the proviso to Rule 22 he may have earned increments in the higher pay scale of the post to which he is promoted on account of his past service and also his previous pay in the promotional post has been taken into account in fixing his pay on promotion. It is these two factors which have increased the pay of the juniors. This cannot be considered as an anomaly requiring the stepping of the pay of the seniors." Same is the view expressed by the Hon'ble Supreme Court in the matter of M.Suryanarayana Rao (supra).

In the matter of Union of India and others v/s. Sushil Kumar Paul and others (supra), on facts the Hon'ble Court found that the concerned junior Government servant (one Shri Mishra) had been given some adhoc promotion. At the time of regular promotion he was getting higher pay because of his earlier adhoc promotion. It was for that reason that even though he was a junior, was getting more pay than the seniors. In view of the said facts, the Hon'ble Court held that, "...the anomaly for granting benefit of stepping up of pay should be directly as a result of the application of Fundamental Rule 22-C and that if a junior officer draws a higher pay in the lower post either because of advance increments or on any other account then the provision of stepping up would not apply in such a case."

Similar to Rule 22 of Fundamental Rules, Rule 41A of the BCSR also provides that anomaly in pay requiring stepping up of pay should be directly as a result of pay fixation made under the said Rule. As discussed hereinabove, the petitioner has failed to establish that the anomaly in question arose on account of fixation of pay under Rule 41A of the BCSR. On the contrary, it is established that such anomaly arose on account of earlier appointment of Shri D.M.Parmar as Junior Clerk and the date of increment. The claim of the petitioner for stepping up of pay is not sustainable. Hence, it is rejected.

There cannot be any dispute that in the judgments relied upon by Mr.Supehia referred to hereinabove the Hon'ble Courts have taken a view that if some excess payment is made to a Government servant on account of mistake or on account of erroneous construction of the relevant rule/provision the excess payment made to such Government servant shall not be recovered. However, as submitted by Mr.Pardiwala, in the present case the recovery in question has been made long ago even prior to

the retirement of the petitioner. The petitioner's pay had also been revised. The pension and other retiral benefits of the petitioner are accordingly determined. Hence, setting aside the recovery made from the petitioner or to order refund of such amount would amount to unsettling the settled position after nearly 15 years. Such a situation is uncalled for. Hence, the prayer for refund of the amount recovered from the petitioner is rejected.

In view of the above discussion, the petition is dismissed. Rule is discharged. The parties shall bear their own costs.

(Ms. R.M.Doshit, J.)

/sakkaf